80-499

No.

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

GEORGE R. WILLIAMS, et al.,
Petitioners,

VS.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, and I.L.W.U. LOCAL No. 10,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not a union breaches its statutory duty to provide fair representation when it agrees to the discharge of a large number of members of the collective bargaining unit for work-related infractions which were not the subject of a discharge penalty when the infractions occurred during the previous four years of employment?

2. Whether or not a union breaches its duty to provide fair representation when it agrees to the discharge of a large number of members of the collective bargaining unit for conduct which was not in violation of any provision of the collective bargaining agreement or applicable working rules at any time during the previous four years of employment?

3. Whether or not a decision of the National Labor Relations Board involving other persons similarly situated, but never subjected to judicial review, is entitled to preclusive effect upon a later case in the courts for unfair representation and breach of the collective bargaining agreement?

4. Whether or not members of the collective bargaining unit may be compelled to agree to the waiver of their rights to fair representation and to be discharged only for good cause as a condition of employment?

5. Whether or not the union and employer breach the collective bargaining agreement when they jointly agree to discharge a large number of members of the bargaining unit without "good cause" and in violation of the past practices of the "common law of the shop"?

6. Whether or not the Court of Appeals abdicated its responsibility to make an independent review of the record when it simply approved the findings of the District Court which were merely xeroxed copies of the findings submitted by the prevailing parties?

THE PARTIES

Petitioners are 51 individuals whose names are listed in the margin.* Respondents are Pacific Maritime Association, a non-profit California corporation composed of all or substantially all of the major stevedoring employers on the Pacific Coast and in the Port of San Francisco. It is an "employer" within the meaning of § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2).

Respondent International Longshoremen's and Warehousemen's Union is the certified collective bargaining representative for all longshoremen employed by the members of PMA and is recognized as such under § 2(5) of the Act, 29 U.S.C. § 152 (5).

Respondent ILWU Local No. 10 is the chartered local affiliate of the ILWU for longshoremen working in the Port of San Francisco.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE R. WILLIAMS, et al., petitioners, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered against them in the above-entitled case on February 8, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 617 F.2d 1321 (1980) and is reprinted in Appendix A. The order of the Court of Appeals denying rehearing is unreported and is reprinted in Appendix B. The findings of fact and conclusions of law and judgment of the District Court are unreported and are reprinted in Appendix C and D. Prior to the rendition of the judgment sought to be reviewed, the Court of Appeals rendered two opinions in previous appeals which are reported at 384 F.2d 935 (1967) and 421 F.2d 1287 (1970).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 8, 1980. A timely petition for rehearing was filed on March 7, 1980 and thereafter denied on May 13, 1980. On July 9, 1980, Mr. Justice Rehnquist extended the time for filing a petition for certiorari to and including September 29, 1980. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Sections 7, 8(d), 9(a) and 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§157, 158, 159 and 160, and §301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. § 185. The pertinent provisions thereof are set forth in full in Appendix E.

STATEMENT OF THE CASE

This is a case brought against a union and an employer for breach of the union's duty to provide fair representation and for breach of the collective bargaining agreement. It poses fundamental issues in a developing area of labor law regarding the statutory duty of labor unions to provide fair representation within the meaning of this Court's landmark case of *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944) and its later evolution in the decision of *Vaca v. Sipes*, 386 U.S. 171 (1967). It calls for a realistic examination of the limits of the authority granted by Congress to certified bargaining representatives. It involves questions of enormous importance not only to the general administration of our labor laws, but also specifically to the thousands of working people, primarily those like petitioners who are not eligible for union membership, whose livelihoods are completely regulated by collective bargaining agreements negotiated and administered throughout the United States.

After four years of employment, petitioners were summarily discharged by the joint action of their collective bargaining representative and employer. Both the District Court, after trial, and the Court of Appeals approved the imposition of the capital punishment of industrial relations upon petitioners for conduct which was the subject of only nominal fines or brief suspensions from work when they occurred years earlier. The Ninth Circuit, while paying lip service to the decisions of this Court, brushed aside the suggestion that the applicability of a discharge penalty on a retroactive basis violated any concept of industrial due process. It reached that conclusion because the employees agreed, as a condition of accepting their jobs, to allow the union and employer to revoke their employment for "any other cause" in the years ahead. The opinion of the Court of Appeals failed to give recognition to the "common law of the shop" developed over the past 30 years

in the Pacific Coast longshore industry, where longshoremen have always been given a second chance when they committed infractions on the job. The opinion disregards the admonition of Mr. Justice Murphy, who warned of the possible unconstitutional delegation of authority inherent in the very concept of allowing arbitrary conduct by a collective bargaining representative. *Steele v. Louisville and Nashville R. Co.*, 323 U.S. at 208-209 (Murphy, J. concurring opinion).

The Case in a Nutshell

The instant dispute arises in an industry where all decisions about the hiring and firing of longshore employees are made by both the union and employer acting through joint committees. Longshore employment is obtained by means of "registration" on a registration list maintained jointly by the union and employer.

There are two classifications of registered, full-time longshoremen in the Port of San Francisco, Class A and Class B. Those registered in Class A are considered to have "full registration", are eligible for membership in the union, Local 10 of the International Longshoremen's and Warehousemen's Union, and have priority in being dispatched to jobs from the central dispatch hall operated jointly by the union and the stevedoring companies, Pacific Maritime Association ("PMA"). Those registered in Class B are considered to have "limited registration", are not eligible for union membership, and are dispatched to jobs after all the Class A men have been dispatched. All aspects of longshore employment in each port on the Pacific Coast are administered by a Joint Port Labor Relations Committee ("Port Committee") composed of representatives of the ILWU and PMA.

Petitioners are 51 former Class B longshoremen in San Francisco, who were registered in 1959 and, as with all new employees in any industry, they were provided with

written and oral working rules. These rules provided that they were required to devote their entire working efforts to the industry and were to be physically present in the dispatch hall 70% of each 30 day period when the dispatch hall was open.The rules also provided that drinking on the job was not allowed, and that each longshoreman was required to report his hours worked each calendar quarter under a "low man out" system of dispatch ("LMO") so that available work opportunities could be equally distributed among his fellow workers. Although neither the basic collective bargaining agreement nor any rule adopted in the Port of San Francisco specified any amount, petitioners were also told that they would be required to pay $6.00 each month to Local 10 as their "pro rata" or proportionate share of the cost of operating the dispatch hall.

Each formal and informal working rule contained a specific penalty for its infraction. If a man was found to be intoxicated on the job, he would be suspended from work for 30 days for the first incident and discharged or "deregistered" for the second incident. If he made an error of at least 10 hours in reporting his accumulated working hours under the low man out dispatching procedure, he would be suspended from work for 30 days for the first offense and six months for the second offense. A third offense would result in deregistration. Although not authorized by either the basic collective bargaining agreement or any local rule, petitioners were told that if a monthly pro rata payment was late, there would be a fine of $1.00 for each day of delinquency which was to be paid to the union.

Four years later, on June 17, 1963, the ILWU and PMA adopted standards to determine the promotion of the B men to Class A. These promotion standards provided that only those B men would be promoted who had not made 6 late pro rata payments, had not been found guilty of intoxication on any occasion and had not been guilty of a single low man out

violation. The discharge penalty was imposed for acts or infractions that had occurred years earlier and for which the penalties then in effect had already been paid. The penalties on a graduated scale in effect during the preceding four years of employment were disregarded. Those B men who met the standards were advanced to Class A. The others, including petitioners, were deregistered from the B list. In effect, the standards for promotion became the criteria for determining good standing. This new criteria was applied to past conduct and petitioners were not provided an opportunity to meet that criteria to retain their jobs.

These promotion standards were never again used to determine who would be discharged. Immediately after petitioners were deregistered, an entirely new group of 701 B men were registered. They were not required to meet the standards used to deregister petitioners.

The nature of this dispute is best illustrated by these typical examples of the circumstances under which petitioners were deregistered.

Pro Rata.

Petitioner Ulysses Hawkins worked for four years as a longshoreman and *did not violate a single rule adopted by the Port Committee.* Mr. Hawkins made the mistake of listening to and relying upon ILWU officials who told him that the only penalty for making his pro rata payments late would be a $1.00 per day fine. In fact, the Port Committee had neither fixed the amount of pro rata nor the penalty for its late payment and had not delegated that authority to Local 10. Mr. Hawkins paid late nine times in four years.[1] He paid his fines to Local 10. Local 10 retained the fines and, for 4 years made no complaint to the Port Committee about his late payments. He was paid up and

[1]Ex. A (Ex. F, 4th page).

current with his pro rata shares and delinquency payments in June 1963, when he was deregistered.

Intoxication.

On September 6, 1960, petitioner Ellis E. Graves was found guilty by the Port Committee of being intoxicated while on the job. The incident when the intoxication occurred was on July 22, 1960.[2] In conformance with the rules and penalties in existence at that time, he was suspended from work for 30 days, commencing September 6, 1960. Following his suspension, he returned to work and continued to remain working as a Class B longshoreman with the knowledge, consent, agreement and permission of respondents until June 17, 1963 when he was deregistered. Thus his deregistration occurred almost three years after the alleged intoxication incident and approximately two and three quarter years after his suspension had been completed. Up to and including June 17, 1963, the deregistration date, no official of the ILWU or PMA had informed Mr. Graves that he might lose his job because of a single intoxication incident which occurred almost three years earlier. In fact, in 1960, when he was convicted, the Port Committee warned him that if he was found guilty *again* he would be deregistered "in accordance with the Class 'B' rules".[3] He adhered to the warning and was never again involved with intoxication and engaged in no serious infractions of the rules which would have been grounds for deregistration. He devoted almost three additional years of his working life to the industry, believing he had already paid his penalty, the *only* penalty in effect and about which he had been told at the time of registration in 1959, when he was provided with copies of the intoxication rule.[4]

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[2]Ex. HC-4, p. 10.

[3]Ex. HC-4, p. 10.

[4]Ex. N. reproduced in Appendix F, A-88.

Low-Man-Out.

Petitioner Antonio Cafeterio worked four years as a longshoreman and except for a single incident in those four years, would have been advanced to Class A status. On August 12, 1962, a Sunday, his registration number was called by the dispatcher. Because of a rule of the dispatchers, B men were not required to be available for dispatch on Sundays and were not required to penalize themselves by adding hours to their accumulated time if their registration number was called and they missed a dispatch.[5] This would have been the usual procedure under the LMO rules.[6] Mr. Cafeterio relied upon this "Sunday rule". On Sunday, August 12, 1962, he did not come to the dispatch hall. His number was called; he was not there to take a dispatch, and he did not add any hours to his time when he went to work the following day, Monday, August 13, 1962.

In 1963 the ILWU and PMA record checkers did not give any recognition to the Sunday rule in Mr. Cafeterio's case. They charged him with a missing a single dispatch and claimed he violated the rules by 12 hours because of his failure to penalize himself by adding hours to his accumulated time. Assuming Mr. Cafeterio was mistaken in his reliance on the dispatcher's deviations from the written LMO rules, he would have been penalized by a 30 day suspension for the first offence under the LMO rules in existence in August 1962 when this incident occurred. Under the LMO rules as they existed on the single day of his infraction, he would have had an opportunity to protect his job by avoiding a second and third violation. He did not have a single violation of any other work rule on his record during his entire four years of employment. He did not violate the low man out rules by a single hour on any day in four years on the waterfront other

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[5]Ex. R. 773.

[6]Ex. N, Rule 10, A-87.

than the day when he was charged with missing a dispatch. He did not pay his pro rata late on a single occasion and was never called before the Port Committee for an employer complaint. He was deregistered on June 17, 1963 for his first and only infraction on the job in four years.

Following their deregistrations, petitioners applied for and obtained unemployment compensation, despite the opposition of PMA. After extensive hearings before the California Unemployment Insurance Appeals Board, the referee concluded that it was "inherently impossible to believe" that petitioners "could logically have been expected to anticipate that their acts would result in the loss of their employment".[7]

The membership of Local 10, too, concluded that the deregistration penalty could not possibly have conformed with the collective bargaining agreement. Less than three weeks after the deregistrations, the membership of Local 10, upon recommendation of its President, adopted motions to instruct the union side of the Port Committee to promote the B men who were deregistered for pro rata and LMO violations to Class A registration and to simply give the LMO violators "30 days off as per contract".[8] There was no recommendation about a penalty for late pro rata payments because the membership realized none was provided in the contract. The employers' side of the Port Committee refused to go along with these recommendations, the disagreement was taken to the next level of the grievance procedure and was abandoned by those officials of Local 10 who were instrumental in deregistering petitioners in the first place.[9]

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[7]Ex. 7, p. 13. The referee's opinion is reproduced in Appendix I to this petition and the quoted observation appears at A-117.

[8]Ex. 15.

[9]Ex. 341.

The Details

A. Petitioners' Employment and the Collective Bargaining Agreement.

When petitioners began their employment with Pacific Maritime Association in June and August 1959, as Class "B" or limited registered longshoremen,[10] they were among the 750 men selected out of some 9,000 who sought registration. Although neither the basic collective bargaining contract document, the "Pacific Coast Longshore Agreement" ("PCLA") nor any of the work rules adopted by respondents make any reference to union membership among members of the bargaining unit, by custom and practice in the Port of San Francisco, only Class A longshoremen were and are eligible for membership in Local 10. The terms "union membership" and "A registration" have been and are used interchangeably in this Port.[11]

Petitioners, ineligible for membership in the union, had no voice in the collective bargaining process throughout their four years of employment. They could not vote for or against any candidates for union office in Local 10 or the International; they could not participate in the selection of the members of the various joint ILWU-PMA committees or arbitrators, and thus were denied

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[10]Finding No. 1, R. 1491, A-29.

[11]Tr. 2218:22-2219:3 (i.e., Trial transcript, page 2218, line 22 through page 2219, line 3), 2226:9-14. "In order to be a longshoreman, a member of Local 10, you must be an 'A' member, a registered A man." Tr. 2224:12-13. Testimony of Odel Franklin, a union member of more than 30 years and holder of many union offices. Some locals of the ILWU permit B men to become union members. However, Local 10 in San Francisco has never permitted B men to become members and the International Union has done nothing about this situation. Tr. 5586:19-5588:1. It is a discriminatory practice to give priority in dispatching to union members over non-union workers. *Pacific Maritime Association v. N.L.R.B.*, 452 F.2d 8 (9th Cir. 1971). Hence, the necessity to classify longshoremen on a basis other than union membership.

meaningful participation in both the collective bargaining process and the contractual grievance procedure. They could not vote to approve or reject, directly or indirectly, the adoption of the various local work rules. Since they were not members of the union, petitioners were not eligible for the "bill of rights" of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 114(a).

B. The 1959 Working Rules.

In the course of longshore employment, working rules adopted by the Port Committee are distributed to all longshoremen. Printed rules are distributed in the dispatching hall, notices are published in Local 10 Bulletins and meetings are conducted by ILWU officials. When petitioners were registered in 1959, a B men meeting was held July 10, 1959. This was an orientation meeting to inform the 750 newly registered B men about the rules and procedures applicable to their employment. At this meeting, various documents were distributed to the B men explaining the significant working rules involved in this litigation and setting forth the applicable penalties for their infractions:[12]

i. Intoxication.

The written rules provided that if a B man was found guilty of being intoxicated on the job, the penalty for the first offense was 30 days suspension and the penalty for the second offense was mandatory deregistration.[13] The penalties for B men for drunkenness were more stringent than those applicable to A men. For the latter, the first offense was punishable with a 15 day suspension, the second offense with a 30 day suspension and succeed-

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[12]Ex. N. A copy of this key exhibit is reprinted in Appendix F, A-83.

[13]*Id.*, A-88.

ing offenses with a minimum 60 day suspension and the maximum being discretionary.[14]

ii. Pro Rata.

The B men were told by officials of both Local 10 and the International that they were required to make a pro rata payment of $6.00 per month to Local 10 for their share of the cost of operating the dispatching hall. Payment was due on the last day of the month and a $1.00 fine was assessed for each day of delinquency. The B men were never informed, either orally or in writing, by any official of the union, PMA or the Port Committee, that they could be deregistered or otherwise penalized for late payment of pro rata, other than the $1.00 delinquency fine.[15] The only penalty that applied to B men for the late payment of pro rata throughout the entire period of their employment was the $1.00 a day fine.[16]

Pro rata payments and penalties were paid directly to Local 10. The payments and penalties were identical in amount to the union dues paid by members of Local 10.[17] The relevant provision of the collective barganing agreement relating to pro rata is as follows:

> "§ 8.12
>
> "Any longshoreman who is not a member of the Union shall be permitted to use the dispatching hall only if he pays his pro rata share of the expenses related to the dispatching hall, the Labor Relations Committee, etc. The amount of these payments and the manner of paying them *shall be fixed by the Joint Port Labor Relations Committees.*" (emphasis added)

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[14]Ex. 1, §§ 17.823, 17.8231, 17.8232, 17.8233, p. 60.

[15]R. 676:14-32; Tr. 3031:14-3033:5.

[16]Tr. 2277:11-19 (testimony of Odel Franklin, official of Local 10).

[17]Tr. 2213:22-2214:9 (testimony of Odel Franklin).

Throughout the entire period of petitioners' employment, the Port Committee in San Francisco did not fix the amount of pro rata payments, the manner of paying them or the penalty for late payment. It did not authorize payment to be made directly to Local 10. Local 10 did not account to either PMA or the Port Committee for the assessments or penalties. The Port Committee never collected any of the pro rata payments from the B men. There was no Port Committee rule, formal or informal, with regard to pro rata.[18]

Within a few weeks of commencement of the trial in 1974, the staff of PMA searched the Port Committee minutes and could not locate any notation setting the amount of pro rata or any reference to the manner of making payments, to whom the payments should be made, and with what frequency they should be made.[19] There was no limit on the number of times a B man could pay his pro rata late throughout petitioners' employment.[20] Not only was there a lack of any rule authorizing or directing the payment of pro rata to the union, but there was no provision in the collective bargaining agreement itself authorizing or directing such payment.[21] The collective bargaining agreement does not provide for fines or penalties for late payment.[22] There is no evidence in the record that Local 10 ever officially adopted a motion or rule fixing the amount of pro rata to be paid by B men or the penalty for late payment.

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[18]Tr. 553:9-554:12, 554:21-25, 555:9-556:1 (testimony of Ralph R. Holtgrave, senior PMA official in San Francisco during the period of plaintiffs' registration); Tr. 1073:23-1074:2, 1079:14-23, 1080:11-17 (testimony of John Trupp, an official of PMA).

[19]Tr. 1074:3-1075:18.

[20]Tr. 1081:18-1082.3.

[21]Tr. 563:17-564:1.

[22]Tr. 565:2-6.

Petitioners' testimony that they received no notice or warning that late payment of pro rata could result in their deregistration was also corroborated by W. L. Brown, a PMA official who was in charge of coordinating the opposition of PMA to petitioners' claims for unemployment compensation. The notes of the California Unemployment Insurance Appeals Board interviewer who spoke to Mr. Brown about a petitioner deregistered for late pro rata payments show:

> "Misconduct eligibility—Mr. W. L. Brown stated in telephone conversation that *to his* [*i.e., Mr. Brown's*] *knowledge claimant never received any written notice of the rule, nor was he ever warned that he could be deregistered if he did not make timely payments.* Claimant paid his pro rata share of expenses. He admits they were not always timely, but he paid fees for untimeliness. In the absence of written notice or warning it can not be shown that the claimant was discharged for misconduct. The facts do not show wilful or wanton disregard of the employer's best interest on part of claimant."[23] (emphasis added).

The practice followed by respondents during petitioners' employment in dealing with pro rata delinquencies by the acceptance of late payments along with delinquency fines without other consequences was entirely consistent with the practice followed by Local 10 in processing dues delinquents among its membership. The record contains documented evidence of Class A longshoremen who were delinquent as much as $1,100.00 in their union dues and allowed to remain working.[24]

The effect of retroactively applying the new pro rata penalty was that petitioners were prohibited from obtain-

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[23]Ex. 10-6, p. 21, lines 7-13.

[24]R. 1050-1053.

ing other full time employment as a condition of remaining registered as B men for four years, were led to believe that they were in full compliance with the applicable rules (as they were), were discouraged from leaving the industry to find new employment at the peak of their working lives, only to be suddenly notified that they had violated a nonexisting rule a few years earlier which caused their deregistrations in June 1963. At that time, many of the petitioners who were terminated because of their late payment of pro rata, all of whom had paid their fines to Local 10, had not been delinquent for as long as two and a half years prior to their deregistrations.[25]

iii. Low-Man-Out.

The low man out system of dispatch under the PCLA provides that longshoremen with the fewest number of hours of employment in a given pay period are dispatched to work ahead of those men who have worked a greater number of hours. It is a means used to equalize work opportunity among longshoremen.[26] The dispatching procedure was essentially as follows: each longshoreman signed his work number or registration number and the accumulated hours he had worked in a calendar quarter on a "sign-in sheet",[27] the dispatchers transposed the information from the numerous sign-in sheets to a "master dispatch sheet"[28] on the master dispatch sheets prepared each day (except for Sunday and Monday when the same sheet was used), the dispatchers placed longshoremen's registration numbers in groups opposite the accumulated hours' figure represent-

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[25]Exs. 23, 24, 26, 30, 34, 36, 38, 39, FU-1, FU-2.

[26]8.42. Dispatching of men and gangs shall be under the principal of low-man low-gang, first-to-be-dispatched, except where local dispatching rules provide otherwise for dispatching of special skilled men and gangs. Ex. 1, p. 35.

[27]Ex. 432.

[28]Exs. MD-1 through MD-77.

ing the total hours worked by each man in that group; those men with the fewest hours of work were dispatched ahead of those men who had a greater number of hours. This was an honor system and if a longshoreman signed in with fewer hours than he had actually worked, he would gain an advantage over other men by obtaining an earlier dispatch to a job. This was referred to as "signing in low", "dropping hours" and "chiseling." If a man missed a dispatch because he was not in the hall when his number was called, this was called a "flop", and he was required to penalize himself by adding a certain number of hours to his accumulated time.

The low-man-out rules bearing the date of May 27, 1959, were distributed to the B men at the orientation meeting conducted by officials of the union on July 10, 1959.[29] With respect to penalties, the LMO rules provided in pertinent part:

> 'Checks' will be made each week and violators will receive the following penalties:
>
> | | |
> |---|---|
> | First offense | 30 days off |
> | Second offense | 6 months off |
> | Third offense | Cancellation of registration |
>
> • • •
>
> These are the only and official rules on the low-man-out system as revised by the Labor Relations Committee up to December 30, 1958. If new rules or changes are needed, they will be issued by the Committee.
>
> THERE ARE NO OTHER RULES[30] (emphasis from original.)

The LMO rules were originally promulgated by the Port Committee in 1951. (The panel erroneously believed the

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[29]Ex. N, 3d document, A-90.

[30]*Id.*, p. 3, A-95.

LMO system had been in effect since 1934. 617 F.2d at 1324, A-3.) Except for minor changes and some clarifications, they remained essentially unchanged in June, 1959. There were no changes in the three-step penalties from 1951 through 1959.[31] A "violation" was defined as chiseling or dropping ten or more hours at the time a violation was uncovered, even if the total number of hours was much larger.[32]

The sudden change in LMO penalties for B men in 1963 was a complete departure from the existing LMO rules and the past practices in administering those rules. The three step penalty provisions were in existence since the birth of the LMO dispatching system in 1951 and throughout petitioners' four years of employment. Without advance notice that the LMO penalties were to be changed, the first violation was suddenly made sufficient cause for cancellation of registration. The new penalty was not applied prospectively to future conduct, but retroactively to conduct which had already occurred when the penalty for the first violation was simply a thirty day suspension from work. A PMA official testified that the Port Committee merely changed the penalty for the first LMO offense to deregistration from the 30 day suspension.[33]

The low man out system of dispatch is a complicated one, as an examination of the LMO rules makes evident. Although instituted in 1951, dispatchers during the period of petitioners' employment in 1959-63 were always asked questions by longshoremen about the dispatching rules. One dispatcher testified:

> " . . . Dispatchers were always asked questions by longshoremen about the dispatching rules. Dispatchers always got questions like 'I flopped. Do I take six or

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[31]Tr. 1047:4-25 (testimony of John Trupp, a PMA official).

[32]Tr. 1048:1-16.

[33]Tr. 1153:15-1154:6.

> do I take the average?' A lot of guys don't know. We got questions like that all the time."[34]

According to the union record checkers, arithmetical errors were very common on the waterfront since the institution of the LMO system, not only among the B men, but also among the A men.[35] John Trupp, an official of PMA, corroborated the testimony of the union record checkers:

> "Down through the years, working with longshoremen, and especially with the low-man-out rules, I've met quite a large number of A men, who did not—who did not understand the rules."[36]

The union record checkers recognized that men sometimes drop an hour or two one day and then add the hours the next day. This was treated as a mistake. Their guiding principle was not to punish men for mistakes, but as stated by one union official, ". . . to catch chiselers. We looked for a pattern of chiseling."[37]

Harry Bridges, International President of the ILWU, recognized the industry practice of allowing longshoremen leeway in adhering to these rules. He testified that the first time a man was caught violating the LMO rules, he was not even given the 30 day penalty but was simply given a warning. The purpose of the warning was to give the man an opportunity to change his conduct so that he could save his job and be a good union person.[38]

The uncontradicted and unqualified testimony of the dispatchers, union record checkers, PMA official John

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[34]R. 955:5-8.

[35]Tr. 4468:21-4869:12.

[36]Tr. 1787:21-24.

[37]Tr. 4871:20-4872:25.

[38]Tr. 5568:14-5569:20.

Trupp and I.L.W.U. International President Harry Bridges stands in sharp contrast to the *ad hominem* comment of the Court of Appeals that "an individual caught more than once chiseling on an honor system does not present a convincing portrait of one who will improve the work force. This is particularly true where, as here, there was little apparent chiseling in the entire group of Class B workers." 617 F.2d at 1321, A-23. Unfortunately, the panel was apparently more influenced by the makeweight arguments of respondents than the realities of the workplace. If the panel was correct, respondents' officials were wrong. The B men were given only a random record check of a single 30 day period in four years for LMO violations to determine who would be promoted and who would lose their jobs. This hardly establishes that the remaining B men were without blemishes over a four year period of employment.

There was never a longshoremen, before or after 1963, either Class A or Class B, who was deregistered for violating the LMO rules for the first violation in the amount of 10 hours or more except for the B men who were deregistered in June of 1963.[39]

C. Petitioners' Deregistrations in 1963.

In the Spring of 1963, respondents decided to promote some B men to Class A and to deregister the others. The standards appear only in summary form in the record and provide, in pertinent part, that any Class B longshoreman would be ineligible for advancement to Class A if he had 10 or more hours of low-man-out violations, had paid his pro rata late eight or more times or six or more times with an otherwise blemished record, or who had been the subject of one employer complaint for intoxication.[40]

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[39]Tr. 1154:22-155:1.

[40]617 F.2d at 1324, A-4, Ex. 408, reprinted in Appendix H.

On June 17, 1963, the Port Committee notified 448 Class B longshoremen that they had been advanced to Class A and notified 78 Class B longshoremen that they had been deregistered.[41] The petitioners were among the deregistered longshoremen who were deregistered for failure to meet one or more of the standards.

Once the 1963 promotion standards were adopted, they were applied to conduct which had already occurred and a PMA official testified that there was nothing further that the men could do to protect their jobs.[42] The conduct made grounds for deregistration in 1963 was not grounds for deregistration when the infractions occurred,[43] but were merely subject to nominal fines or short suspensions from work. In the case of pro rata and intoxication, the fines had already been paid and the suspensions imposed and completed. All petitioners were in good standing as of June 17, 1963. 617 F.2d at 1324, A-5.

The decision of the Port Committee on the merits of petitioners' violations of the standards was final under the collective bargaining agreement in absence of disagreement between the ILWU and PMA.[44] After their deregistration, petitioners were no longer eligible for longshore employment.

Less than three weeks after petitioners were deregistered by the Port Committee, the membership of Local 10 recognized that petitioners were not guilty of any conduct warranting deregistration under the collective bargaining agreement. The membership adopted two resolutions which were proposed by its President and adopted overwhelmingly:

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[41]Ex. 11, Finding No. 81, R. 1514-15, A-53.

[42]Tr. 723:16-724:1.

[43]Tr. 724:2-726:4.

[44]Tr. 757:16-24, 759:5-9; 617 F.2d at 1328, A-12.

President James Kearney made the following recommendation which was overwhelmingly adopted as a motion and instructions to the Union Side of the Local Labor Relations Committee: An additional motion also carried:

M/S/C That all "B" Men Who Are on Appeal and Who Have Not Been Promoted Solely Because of Low-Man-Out Violations Shall Be Given 30 Days Off As Per Contract and Promoted to "A" Registration.

M/S/C That the Labor Relations Committee Be Instructed That All "B" Men Who Are on Appeal and Have Not Been Promoted Solely Because of Pro-Rata Violations Shall Be Re-Registered and Moved to "A" Registration.[45]

Local 10 submitted its motions to the Port Committee, where PMA took them under advisement. The Port Committee reconvened three days later with PMA's attorney present. When PMA disagreed with the Union's motions, the disagreement was referred to the next step in the contractual grievance procedure, the Area Labor Relations Committee.[46] With new officials acting in behalf of the Union, the Union representatives disregarded the instructions of Local 10's membership to treat petitioners under the terms of the contract as it existed during petitioners' entire period of employment. Instead, they agreed with PMA to allow the Port Committee to simply determine if petitioners had violated the 1963 promotional standards during the preceding four years.[47]

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[45]Ex. 15.

[46]Ex. 261, pp. 13-14.

[47]Ex. 341.

In late 1963, many of the petitioners who were deregistered for late payment of pro rata and LMO violations applied for unemployment compensation. PMA filed objections and extensive hearings were held before a referee of the California Unemployment Insurance Appeals Board. After twenty-seven sessions of contested hearings,[48] petitioners obtained their unemployment insurance. Upon review of the testimony of petitioners, PMA officials and ILWU officials, when the facts were fresh in the recollections of all parties, the referee wrote an opinion which is reproduced in Appendix I to this petition. In pertinent part, the referee concluded:

> After analyzing all of the facts, it is inherently impossible to believe that the claimants [petitioners before this Court] herein could logically have been expected to anticipate that their acts would result in the loss of their employment. In brief, the claimants did not embark on a course of action which they knew or should have known would result in the loss of their employment. As a matter of fact, over the years, a pattern of behavior was established which was condoned and allowed by the employer, the union and the joint Port Labor Relations Committee. This pattern was such that violations were handled according to the rules and provisions of the contract and memorandums [sic] and each man continued as a limited registration longshoreman.[49]

The promotional standards and penalties applied against petitioners in June of 1963 were never again used as a means for deregistering a Class B longshoreman. A new group of 701 B men were registered by the Port Committee on October 4, 1963.[50] For the very first time, the Port Committee adopted a pro rata rule providing that

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[48]The transcripts of these hearings are in the record as Exs. 10-3 through 10-24.

[49]Ex. 7, pp. 13-14, A-117-118.

[50]Ex. 276.

each B man pay $8.00 monthly *to the Port Committee* and that collection would be by payroll deduction.[51] The two step intoxication rule was readopted.[52] The LMO rules were changed so that a B man would not be deregistered unless he had erred in at least 16 hours within a 30 day period.[53]

PROCEEDINGS BELOW

Petitioners filed suit in the District Court against their certified collective bargaining representative, the International Longshoremen's and Warehousemen's Union and its San Francisco constituent local, Local 10, and their employer, Pacific Maritime Association to regain their jobs. They prayed for promotion to Class A and/or reinstatement in Class B, along with their resulting damages. Jurisdiction was invoked under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 and 28 U.S.C. §§ 1331(a) and 1337(a). They alleged the union breached its duty to provide fair representation by agreeing to the retroactive application of the discharge penalty, that the employers joined in and collaborated with the union in the breach of its duty, and that the deregistrations were in conflict with the terms of the collective bargaining agreement.[54]

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[51]Ex. 275.

[52]Ex. 274, p. 2.

[53]Tr. 1193:11-1195:15.

[54]The District Court originally granted summary judgment because, *inter alia*, it considered that the National Labor Relations Board had exclusive jurisdiction over the dispute. The Court of Appeals reversed and ordered a trial. *Williams v. Pacific Maritime Ass'n*, 384 F.2d 935 (9th Cir. 1967), *cert. denied*, 390 U.S. 987. Thereafter, the District Court dismissed individual union officials who had been named as defendants and petitioners' claims for punitive and exemplary damages. This latter order was affirmed. *Williams v. Pacific Maritime Ass'n*, 421 F.2d 1287 (9th Cir. 1970).

After a six month trial of the first phase of a bifurcated trial on the issue of liability only and the submission of a 293 page stipulation of uniform testimony,[55] the District Court xeroxed and signed respondents' proposed findings of fact and conclusions of law and entered judgment in their favor. The xeroxed findings and conclusions determined that petitioners failed to exhaust internal contractual remedies and that their deregistrations were not the result of the union's breach of its duty to provide fair representation or breach of the collective bargaining agreement.

The Court of Appeals rejected the District Court's conclusion that petitioners were barred from pursuing their claims because of their purported failure to exhaust internal contractural remedies. 617 F.2d at 1327-30, A-11-16. On the merits, the panel considered petitioners' four years of full time employment to be a "trial period". It found that: there was no breach of the duty to provide fair representation or breach of the collective bargaining agreement because petitioners knew that they were to obey "all the rules"; respondents had the authority to deregister Class B longshoremen for "any other cause" which could be defined in any way or manner decided by respondents at the time of their choosing; petitioners agreed, as a condition of obtaining a job when they signed their employment applications, that their registrations "may be revoked in accordance with such agreements and such rules in effect were hereafter to be agreed upon or adopted" by respondents; and that the validity of the pro rata promotion standard was established by the National Labor Relations Board in a proceeding 14 years earlier involving other deregistered B men. 617 F.2d at 1330-34, A-16-24.

The Ninth Circuit essentially concluded that petitioners agreed, as a condition of employment, to allow respondents

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[55] R. 670.

to remove them from their jobs at any time for any reason. In reaching this conclusion, the panel failed to take any notice of the past collective bargaining practices of the industry during the previous 30 years and decided that the applicable penalties for infractions of the working rules in existence for four years of petitioners' employment were of no consequence.

REASONS FOR GRANTING THE WRIT

In reaching its decision, the Ninth Circuit departed from the teachings of this Court and created needless conflicts with the decisions of other circuits. The panel failed to recognize that the unfair representation opinions of this Court turn on the concept of industrial due process. Put another way, they involve simple fairness. In situations where certain conduct has been tolerated in the past, any possible definition of fairness requires that a change of policy not be imposed until after the employer gives notice that future violations will not be tolerated. *See* Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U.Pa.L. Rev. 251, 273 (1977). The Court of Appeals disregarded this fundamental principle.

The Ninth Circuit also overlooked the distinction between petitioners' separate claims for promotion to Class A and alternatively for reinstatement in Class B. Their claim that it was unfair to apply a promotion standard as a discharge standard was almost totally overlooked. The panel apparently saw nothing wrong with an automatic overnight change in status from four years of good standing to a dischargeable status.

The "common law of the shop" in the Pacific Coast maritime industry has long provided for giving a longshoreman a second chance when he violates a rule of the job. The graduated penalties adopted by respondents recognized this tradition. The Court of Appeals did not accord

any respect to this tradition as it completely abrogated its duty to make an independent examination of the record.

I. The Court of Appeals Disregarded the Teachings of this Court and Needlessly Contributed to the Existing Conflicts Among the Circuits in Fair Representation Cases.

In *Steele v. Louiseville & Nashville R. Co.*, 323 U.S. 192, 202 (1944), this Court held that a labor organization "chosen to represent a craft, is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents". The opinion went on to compare the duty imposed upon the statutory collective bargaining representative to equally protect the interests of members of the craft with the duty imposed by the Constitution upon the legislature to provide equal protection to the interests for whom it legislates. *Ibid.* In *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), the Court further defined the duty, by then extended beyond the overt form of racial discrimination involved in *Steele*, as barring "arbitrary conduct" in the collective bargaining process and in the enforcement of the resulting contract. From its initial recognition, "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.*, 386 U.S. at 177. The policy enunciated in *Steele* and *Vaca* was repeated and reaffirmed most recently in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976) and *Electricians v. Foust*, 442 U.S. 42, 46-47 (1979).

The courts of appeals have generally adhered to the "arbitrary" standard in unfair representation cases, *Griffin v. International U., United Automobile, etc.*, 469 F.2d 181, 183 (4th Cir. 1972); *Jones v. Transworld Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974); *Ruzicka v. General Motors Corporation*, 523 F.2d 306, 309-10 (6th Cir. 1975), *rehear-*

ing denied, 528 F.2d 912 (1975); *Retana v. Apartment, Motel, Hotel and El. Op. U. Loc. No. 14,* 453 F.2d 1018, 1023 (9th Cir. 1972). The Third Circuit continues to interpret the rule of *Vaca* as requiring that the union act with a bad faith motive. *Medlin v. Boeing Vertol Co.,* 620 F.2d 957, 961 (3d Cir. 1980). The Seventh Circuit also demands a showing of intentional, invidious conduct, and holds that "The plaintiff must show that the union's conduct was intentional, invidious, and directed at that particular employee." *Cannon v. Consolidated Freightways Corp.,* 524 F.2d 290, 293 (7th Cir. 1975); *Melendy v. United States Postal Service,* 589 F.2d 256, 258 (7th Cir. 1978).

The Eighth Circuit made an effort to provide further guidance on the standard of fair representation under *Vaca,* and considers "arbitrary and capricious" to mean "an act done without principle or an act not done according to reason and judgment" and requiring judgment "on the basis of whether the act complained of is reasonable or unreasonable under the circumstances." *Foust v. International Broth. of the Elec. Workers,* 572 F.2d 710, 714 (10th Cir. 1978), *rev'd in part on other grounds,* 442 U.S. 42 (1979). It also holds that where the union makes no effort to evaluate individual capabilities of members of the bargaining unit, there could be a violation of the union's duty to provide fair representation. *Petersen v. Rath Packing Company,* 461 F.2d 312, 315 (8th Cir. 1972).

The crucial element in petitioners' breach of duty claim is that they were not told the specific penalties to be applied in case of infractions of the rules and certainly would not have accepted their employment if they knew they were required to maintain a perfect record in order to keep their jobs. The Ninth Circuit apparently saw nothing wrong with such a requirement. Surprisingly, in a case decided prior to the case at bench, another panel of the Ninth Circuit determined that a breach of duty occurred when the union failed to explain the rights and duties under

the contract to members of the bargaining unit, even though the complained of action did not involve breach of a specific provision of the collective bargaining agreement. *Retana v. Apartment, Motel, Hotel and El. Op. U. Loc. No. 14, supra,* 453 F.2d at 1023. The Third Circuit, in a case strikingly similar to the case at bench, held that the union breached its duty where it failed to advise the plaintiff of the exact penalty which could be imposed for not paying an increase of $9.75 in his union dues over a period of three months, so that he could act to prevent these occurrences in the future and to take all necessary steps to protect his job. *Brady v. Trans World Airlines, Inc.,* 401 F.2d 87, 99 (3d Cir. 1968) *cert. denied sub nom. International Ass'n of Machinists v. Brady,* 393 U.S. 1048.

While purporting to apply the "bad faith or arbitrariness" standard (617 F.2d at 1330, A-17), the panel actually departed from it. The panel did not point to any explicit evidence that petitioners were told they could lose their jobs for the first LMO or intoxication offense, either at the time the incidents occurred or at any time thereafter. It was equally unable to find any evidence that any petitioner, or any one else on the waterfront among labor or management, considered late payment of pro rata to be a discharge offense. There is no dispute about the authority of the union and employer to establish criteria to determine eligibility for promotion. Even if the 1963 promotion standards were fair and reasonable for that purpose, they would not be a fair and reasonable basis for discharging those employees who were not promoted. Discharge "for cause" means for commission of acts to the extent that they bear a prescribed discharge penalty. No such prescribed penalty appears anywhere in the record of this case until June 17, 1963.

The panel's decision is in direct conflict with the principles of fairness underlying the fair representation decisions of the Court as well as the application of that

principle in the Third Circuit case of *Brady v. Trans World Airlines, Inc.* and the Ninth Circuit's own decision in *Retana v. Apartment, Motel, Hotel and El. Op. U. Loc. No. 14.*

The Ninth Circuit held in the instant case that the contract could be amended and adversely affect the rights of petitioners. This precise conclusion was the view of the concurring opinion in *Humphrey v. Moore,* 375 U.S. 335, 353-55 (1964) but was rejected by the majority of the Court. The Ninth Circuit also placed itself in conflict with the Third Circuit when it held that petitioners' rights under the collective bargaining agreement could be modified by creating dischargeable offenses where none existed previously. In *Price v. International Bro. of Teamsters,* 457 F.2d 605, 610 (3d Cir. 1972), the Court interpreted the congressional policy of our labor laws to have the "implicit assumption" that "absent appropriate amendment of the labor contract, there could be no changes in the agreement that would abrogate rights contained in it. While modification could add to or explain provisions, it could not take away any rights already there." Although in conflict with the majority opinion in *Humphrey v. Moore* and the Third Circuit view, the opinion of the Ninth Circuit appears to conform with that of the Fourth Circuit where it was held that the union and employer may modify an agreement and thereby effect vested rights. *Ekas v. Carling Nat. Breweries, Inc.,* 602 F.2d 664, 667 (4th Cir. 1979), *cert. denied,* ..... U.S. ....., 100 S.Ct. 669.

Fundamental fairness requires that employees be allowed to rely on existing working rules until changed. Only prospective application of new penalties would be compatible with any concept of industrial due process. The rights involved arise from federal law and must be applied uniformly. The authority of unions and employers to adversely affect these rights in the course of collective bargaining should be clarified by this Court.

II. The Union and Employer Cannot Condition Employment Upon a Waiver of the Statutory Right to Fair Representation And The Right To Demand Compliance With the Collective Bargaining Agreement.

In support of its recognition of the unlimited authority of a bargaining representative to assist in terminating workers at their whim for "any other cause", the Court of Appeals could locate two sources in the mammoth record of this case. The first was Section 9(a)(xi) of the document adopted by respondents entitled the "1958 Memorandum of Rules Governing Registration and Deregistration of Longshoremen in the Port of San Francisco." This latter document provided that a Class B longshoreman may be deregistered "for cause" by the Port Committee "in accordance with such rules or uniform procedures as may be established or followed by the Committee if the Committee finds . . . any other cause". The second was a section in the employment application signed by petitioners in 1959, where each applicant acknowledged that Class B registration would "be subject to agreements between the PMA and ILWU . . . and to rules with respect to registration and deregistration established by said party; I understand that . . . registration may be revoked *in accordance with such agreements and such rules now in effect or hereafter to be agreed upon or adopted* . . ." 617 F.2d at 1331-32, A-19-20 (emphasis by the Court). It takes little imagination to see the potential for abuse inherent in these powers respondents sought to delegate to themselves.

No one explained to any of the petitioners that by signing the employment application and agreeing to their deregistration for "any cause" or "any other cause", they would waive their rights to have the ILWU provide them with fair representation, to demand that respondents comply with the collective bargaining agreement, or any other legal rights to which they were entitled.[56] The applications

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[56]R. 676, 6-13, 685:21-31.

were mass-produced by the thousands and submitted to petitioners on a take-it-or-leave-it basis. There is no explicit reference to changing the work rules and penalties without prior notice, or to applying a discharge penalty where none existed previously. Petitioners did not agree, in advance, to surrender their jobs for the first infractions of the LMO or intoxication rules or the nonexistent pro rata rule.

This Court long ago held that individual contracts of employment could not be construed as a "waiver of rights" under a collective bargaining agreement. *J. I. Case Co. v. Labor Board,* 321 U.S. 332, 336 (1944). At most, the employment applications were contracts of adhesion which are carefully scrutinized by the courts for the purpose of avoiding provisions found to be unconscionable or the result of over-reaching. 6A Corbin on Contracts, § 1376, p. 21 (1962 ed.) The Court has recognized that contracts contrary to public policy are invalid. *Bisso v. Inland Waterways Corporation,* 349 U.S. 85, 90 (1955). Since the waiver of statutory rights as a condition of employment would be contrary to national labor policy at a minimum and ambiguous at most, any such waiver would have to be construed against respondents and the interpretation adopted by the Court of Appeals.

Only one other court appears to have dealt with a union requirement that an employee maintain an absolutely clean record. In *Archie v. Chicago Truck Drivers, etc.,* 585 F.2d 210, 218 (7th Cir. 1978), the Court considered it to be a breach of duty to provide fair representation where the union required the plaintiff to sign a statement asking for reinstatement on condition that there be "irretrievable termination" of his employment if he made any error in checking freight for a period of one year. This should be contrasted with the finding of the District Court and accepted by the Court of Appeals in the present case that petitioners knew they were required to maintain "an absolutely clean record" in order to retain their jobs.[57]

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[57] Finding No. 34, R. 1500, A-39.

III. A Decision of The National Labor Relations Board Cannot Preclude The Federal Courts From A Full Examination Of Petitioners' Claims.

The panel declined to consider the uncontradicted evidence that the pro rata rule was nothing more than an informal practice and that it was invoked in such a way as to deregister a large number of B men for reasons unauthorized by any contractual provision of the collective bargaining agreement. Rather than resolving this crucial issue on its substantive merits, i.e., did the application of this promotional standard deprive petitioners of fair representation and did it result in breach of the collective bargaining agreement, the Court of Appeals simply referred to an earlier decision of the National Labor Relations Board which held that ". . . it is not irrational or capricious to believe that one who is lax in meeting his obligations to his fellows to share the costs of the dispatching hall may not develop into a conscientious and reliable worker. *Pacific Maritime Ass'n* (Johnson Lee), 155 NLRB 1231, 1234 (1955)." 617 F.2d at 1333, A-23.

The federal courts are not and should not be precluded from examining an issue resolved by the Board years earlier when different legal principles and standard applied. The *Johnson Lee* case involved five other Class B longshoremen who were deregistered with petitioners. After the filing of unfair labor practice charges, a complaint issued, findings were made by a trial examiner and later reversed by the Board. Review of the Board's final order was not sought in the Court of Appeals by the charging parties as authorized by § 10(f) of the Labor Management Relations Act, 29 U.S.C. § 160(f). *Auto Workers v. Scofield*, 382 U.S. 205, 210 (1965).

The Ninth Circuit's reliance on the NLRB decision poses a grave risk of frustrating the basic purposes underlying the fair representation doctrine. The Board's decision was not concerned with whether or not there was a breach of the duty to provide fair representation, but simply with whether or not there was an unfair labor practice with

respect to the pro rata standard. The Board did not consider any claim of breach of contract. As stated by the union attorney during the course of proceedings before the trial examiner, the sole issue was whether or not the pro rata standard was in conflict with §§ 8(a)(1) and 8(b)(1) of the LMRA:

> "We are not here concerned with a general cause of action that might or might not exist some place else. *The statutory scheme we are concerned with relates to discrimination if it exists for the purpose of encouraging or discouraging membership in a union or participation in union activities.*
>
> This is so elementary, that the Trial Examiner is so familiar with it, I don't have to burden the point." (Emphasis added).[58]

The standard applied by the Board was entirely different from that invoked by the courts in fair representation cases. The decision and order of the NLRB was concerned with the "true purpose or real motivation" of the union. 155 NLRB at 1233. The Board referred to the pro rata standard as a "credit standard" and considered that " a person's credit standing which reflects upon his character, may well be reasonably related to his performance as a responsible employee". *Id.* at 1234. Assuming that an unfair labor practice is exactly the same type of unlawful conduct as breach of the statutory duty to provide fair representation, there has been a profound change in the law subsequent to the Board's decision. It is no longer necessary to establish the "true purpose or real motivation" of the union. A complaining party need not establish that the conduct of the union was a pretext for an improper motive. *Vaca v. Sipes* held that the standard applied in fair representation cases is with whether or not the union's conduct is arbitrary, discriminatory or in bad faith. 386 U.S. at 190.

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[58]Ex. J, 29:7-17.

Consideration of a person's "credit standing" was only a legal argument and not a matter having a factual basis, for any consideration of a B man's "credit standing" was unknown to Ralph R. Holtgrave, senior PMA official in San Francisco at the time the promotion standards were adopted in 1963.[59] Recognition of an employee's "credit standing" as a condition to maintaining employment would be contrary to public policy. *See Stewart v. Travelers Corporation*, 503 F.2d 108, 113, 114 (9th Cir. 1974).

Finally, even if the issues decided by the NLRB and presented by petitioners in the case at bench were identical, traditional rules of collateral estoppel would not apply. The proceedings before the trial examiner extended over a period of only three days while the case at bench had a six months trial, a 293 page stipulation of uniform testimony and approximately 1,000 exhibits. Petitioners were not parties to the Board proceedings and did not participate in them. Their potential remedy before the Board was uncertain in 1963 and they presented many issues in court which were not presented to the Board. More importantly, there has been a change in the legal standard of fair representation brought about by this Court's decision in *Vaca v. Sipes*. All of these factors militate against applying the doctrine of collateral estoppel. *Restatement (Second) of Judgments*, § 68.1 (Ten. Draft No. 1, 1973).

IV. The Findings Below Are The Result of Obvious and Exceptional Error, Because The Court of Appeals Failed to Make An Independent Review of the Record.

The panel's opinion gives every indication that it failed to make an independent review of the record which is remarkably free of conflict. Perhaps the basic misunderstanding of the record by the panel was its consideration of petitioners as "provisional" or "probationary workers". 617 F.2d at 1330, A-17. Petitioners were not temporary, casual, provisional or probationary workers of any kind.

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[59]Tr. 569:9-73:1.

None of the joint ILWU-PMA committees considered them to be anything other than full time, registered longshoremen, and there is no document which described them with the labels fixed by the panel.

PMA officials would hardly agree with the Court of Appeals. One PMA witness testified that Class B longshoremen were considered full time employees.[60] They were sometimes required to be available for work in the dispatching hall seven days a week. Respondents did not permit B men to obtain other employment and they could not moonlight while on the registration list.[61] Four years of employment under these conditions flies directly in the face of any "probationary" or "provisional" characterization of petitioners' status.

The Court of Appeals went on to state its observation that the "record establishes, moreover, that even before the 1963 standards for admission to Class A status were negotiated, the appellants [petitioners before this Court] understood that the actions for which they ultimately were deregistered constituted misconduct . . . warnings to longshoremen not to engage in such misconduct abound in the record". 617 F.2d 1332, A-21. The Court was dead wrong about the record. Petitioners were not deregistered for "misconduct" but for failure to satisfy the explicit promotion standards. There is no evidence in the record that Class B longshoremen received any "warnings" that they would lose their jobs for a single violation of the working rules incorporated into the promotion standards. A senior PMA official testified that in this case, to be deregistered, a man had to be disqualified under one of these standards.[62] General misconduct, however defined elsewhere, was not involved in the loss of petitioners' jobs.

This Court has recognized that it may review findings of fact under the "two court rule" if there is "a very obvious

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[60]Tr. 1836:22-24.

[61]Tr. 1837:5-1838:1.

[62]Tr. 518:12-17; 521:9-522:12.

and exceptional showing of error". *Graver Tank & Mfg. Co. v. Linde Aire Prod. Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967). Unlike the trial judge in the *Graver Tank* case, the district judge in the case at bench did not write a "careful and succinct opinion". Despite this difference, the Court may, and has, reviewed factual determinations where warranted. *U.S. v. Ceccolini*, 435 U.S. 268, 273, 279-80 (1978). A mistaken view by the Court of Appeals of the evidence in the record is recognized as a proper circumstance to allow this Court to reconsider the record where there is no evidence to support critical findings. *Rose v. Mitchell*, 443 U.S. 545, 569-72 (1979). The Court did not hesitate to make an independent determination of the sufficiency of the evidence to support the jury verdict in *Humphrey v. Moore*, 375 U.S. at 348-51. This is a minimum requirement in fair representation cases.

The panel's confusion about the record is best illustrated by its comments on pro rata. It completely misread the record when it said: "Longshoremen were admonished several times against late payment or nonpayment of pro rata charges, most notably in letters sent to each worker applying for Class B status." 617 F.2d at 1332, A-21. The fact of the matter is that there is absolutely nothing in the record to indicate the Class B longshoremen were admonished at all against late payment under the nonexistent pro rata rule. Those petitioners deregistered for late payment of pro rata lost their jobs for *late* payment, not *non*payment. The panel's reference to "letters sent to each worker applying for Class B status" refers to Exhibit CL, reproduced in Appendix G to this petition, and provides in pertinent part that "failure to make such [pro rata] payments . . ." may be grounds for deregistration. But none of the petitioners before this Court were deregistered or penalized in any way during their four years of employment for failure to make pro rata payments. The uncontradicted testimony

of PMA officials is in direct conflict with the panel's interpretation of the "letters sent to each worker applying for Class B status". John Trupp, an official of PMA, testified that he could find nothing in those letters which specified that a Class B longshoreman could be deregistered for late payment of pro rata. He further testified that the petitioners who were charged with violating the nonexistent pro rata rule were deregistered for *late* payment, not *non*payment.[63] W. L. Brown, another PMA official, stated that petitioners never received *written notice* or any kind of warning that they could be deregistered for late payments.[64]

We have already referred to the motions of the membership of Local 10 indicating that the membership knew nothing about the deregistration penalty for late payment of pro rata. There is simply no evidence in the vast record of this case to even suggest that petitioners or anyone else on the waterfront in San Francisco knew that any late payments could cost a longshoreman his job.

Perhaps the most explicit explanation of what petitioners were told about pro rata was the explanation of petitioner Cleo Love, who had an opportunity to explain this very point to Harry Bridges, International President of the ILWU during a grievance hearing:

> Mr. Love: . . . There's one more question. I'd like for someone to tell me why they accept the money and take my job for the same thing that I'm supposed to be paying for. Once you pay that penalty, you are clear. Then years later I lose the same job that they say I paid the penalty for.[65]
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> Mr. Bridges: Were you ever present at a Special B men's meeting that you were asked to attend and was called officially by the Local and they advised all B men to show up?

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[63]Tr. 1824:25-1826:12.

[64]Ex. 10-6, p. 21, lines 7-13.

[65]Ex. AL, 54:3-8.

Mr. Love: Yes, I was.

Mr. Bridges: How many of them?

Mr. Love: I think we had only two or three. I was at each one of them.

Mr. Bridges: Do you recall me at those meetings telling the B men that their records were being watched and they would count against them eventually.

Mr. Love: Yes, I do. If you notice my record, I don't have a black mark on my record. They can't say I was drunk on the job, talking nasty to the boss, refuse to work, not anybody. You can't find anything on the record.

Mr. Bridges: At those meetings I talked to the B men about what could eventually count against them to be an A man. Do you recall me talking about them being promoted?

Mr. Love: Yes.

Mr. Bridges: Do you recall anything I said about paying the costs of the hiring hall?

Mr. Love: Yes, I do.

Mr. Bridges: You don't recall that I indicated or said that people who didn't pay this it would count against them eventually?

Mr. Love: Yes. You said that people that didn't pay it would count against you. I'm not one of the guys that didn't pay. But I paid late. *And you didn't say in any of your talks to us that paying late we would lose our jobs.* You said that people that don't pay it would count against you". (emphasis added)

Mr. Ernst [Attorney for PMA]: Anything more? We should try to take care of those three clerk cases, Los Angeles—Seattle, if we can.[66]

* * *

Mr. Love: Well, there's no rule in the contract that says you'll lose your job for late payments.

Mr. Bridges: The rules in the hiring hall are made at the Local.

Mr. Love: All I know, Mr. Bridges, is that rules that we seen in the office over there, what the officials said, and *the officials never said that you would lose*

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[66] *Id.*, 55:18-56:22.

your job for late paying dues. You lose your job if you don't pay your dues. (Emphasis added)

Mr. Bridges: If you were talking about a license tag, you eventually lose your license to drive even though you pay fines and so forth. If you get enough traffic violations, you know that you lose your license and insurance. There are a lot of people without insurance. It's like truck drivers without a license to drive. They can't work either.

Mr. Love: Like you say, they lose their license. They don't take it away permanently. They may give 30 days suspension. What they did here is they took the job completely with no suspension—no nothing.[67]

Mr. Bridges did not respond, and respondents did not produce a single witness or a single piece of evidence to contradict Mr. Love. As pointed out above, two PMA officials actually corroborated his testimony. The panel made a grievous error in its reading of the record.

V. Respondents Breached the Collective Bargaining Agreement By Deregistering Petitioners Without "Good Cause" and in Violation of the "Common Law of the Shop".

In conceding arbitrary authority to the PMA and ILWU to discharge a member of the bargaining unit for an amorphous "any other cause" and in disregarding the "common law of the shop", the Ninth Circuit placed yet another part of its decision in conflict with the decisions of other circuits as well as this Court.

The jurisdiction of federal courts to hear claims of individual employees for breach of collective bargaining agreements was finally determined in *Smith v. Evening News,* 371 U.S. 195 (1962). Where an employee is not at fault, he cannot be disciplined, and a discharge for cause means "good cause". *Day v. United Automobile, Aerospace & Agr. Implement Workers of America, Local 36,* 466 F.2d 83, 90-92 (6th Cir. 1972). The District Court found that the ILWU-PMA contract provided that a B man could be de-

[67] *Id.*, 59:4-21.

registered by respondents at their sole discretion "for any cause".[68] An almost identical contention was rejected by the Court in *Boone v. Armstrong Cork Company,* 384 F.2d 285, 291 (5th Cir. 1967):

> "It is true that whatever rights an employee subject to a collective bargaining agreement possesses limiting his employer's right to discharge him must find their source in the agreement, [citations] *but a restriction on an employer's right to discharge at will may be implied.*" (emphasis supplied).

Throughout petitioners' four years of employment, they were in good standing, as conceded by the Court of Appeals. 617 F.2d at 1324, A-5. Throughout these four years, they had committed no infractions warranting dismissal under any of the terms of the basic agreement or applicable working rules. If "good cause" is an implied condition of the collective bargaining agreement, then the deregistrations of petitioners were in violation of the contract because there was no "good cause" for terminating them. However, only if "any other cause" is to be recognized as authorizing a new form of discipline to be imposed many years after the infractions occurred, do the deregistrations of petitioners not violate the contract.

The common law of the shop of this industry during the past 30 years never authorized deregistering a longshoreman unless there was a specific contractual provision or working rule authorizing that harsh penalty at the time the infractions occurred. This aspect of the common law of the shop was recognized by the two motions of Local 10 calling for petitioners to be disciplined only "as per contract" and thereafter reinstated and registered in Class A. The practices of the PMA and ILWU in administering the various provisions of the contract and working rules constitute part of the collective bargaining agreement.

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[68]Finding No. 23, "In keeping with the nature of the status of the limited registration Class B longshoremen, the contract provided that he could be deregistered for any cause." R. 1497, A-36.

Lax enforcement of the rules, graduated penalties and understandings of human frailties have long characterized Pacific Coast longshore employment. Harry Bridges, International President of the I.L.W.U. and its leader for over 30 years, told the trial court that a longshoreman was only given a warning for the first low man out violation.[69] John Trupp, a longtime official of PMA, told the trial court that the custom in the industry was to give rule violators a second chance for being intoxicated on the job[70] and for low man out violations.[71] The penalty information provided to petitioners was part and parcel of this tradition. It was ignored by Court of Appeals.

> "[T]he industrial common law, the practices of the industry and of the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

Violation of the common law of the shop constitutes violation of the collective bargaining agreement. The Ninth Circuit declined to follow this well established principle.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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September 23, 1980

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[69]Tr. 5568:14-5569:20.

[70]Tr. 1833:10-14.

[71]Tr. 1834:23-25.